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# Insurance

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## INSURANCE

To view the Indiana insurance legislation in the proper perspective a short resumé of past regulation precedes the discussion of the enactments of the 1947 General Assembly.

*Introduction*—In 1869, the United States Supreme Court in *Paul v. Virginia*,<sup>1</sup> decided that “issuing a policy of insurance is not a transaction of commerce.”<sup>2</sup> This decision was reaffirmed in 1895<sup>3</sup> and again in 1913.<sup>4</sup> Then the “precedent smashing”<sup>5</sup> *South-Eastern Underwriters*<sup>6</sup> decision was handed down. The United States brought an indictment against certain insurance underwriters under the Sherman Anti-Trust act.<sup>7</sup> The action was dismissed in the court below on

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22. Ind. Stat. Ann. (Burns, Supp. 1945) §18-3111.
  23. Ind. Acts 1947, c. 135, § 2(d). This time limit accords with that of Ind. Acts 1947, c. 138, § 2, which applies to Savings Banks.
  24. Ind. Acts 1947, c. 135, §2(d).
  25. Id. §3. Reserve balance requirements are specified in Ind. Stat. Ann. (Burns, Supp. 1945) §18-3113.
  26. Ind. Acts 1947, c. 243, amending Ind. Stat. Ann. (Burns, 1933) §18-2226.
    1. 8 Wall. 168 (U.S. 1869).
    2. Id. at 183.
    3. Hooper v. California, 155 U.S. 648 (1895).
    4. New York Life Ins. Co. v. Deer Lodge County, 231 U.S. 495 (1913).
    5. Sen. Rep. No. 1112, 78th Cong., 2d Sess. 2 (1944).
    6. U.S. v. South-Eastern Underwriters Association, 322 U.S. 533 (1944); compare Polish National Alliance v. N.L.R.B., 322 U.S. 643 (1944).
    7. 26 Stat. 209 (1890), 15 U.S.C. §§1-2 (1940).

the ground that the Sherman Act was not applicable since insurance was not interstate commerce.<sup>8</sup> The Supreme Court reversed. Mr. Justice Black for the majority,<sup>9</sup> pointed out that in deciding whether this vast business was subject to federal regulation, it was proper to look at the transaction as a whole and not just the isolated incidents of executing an insurance contract.<sup>10</sup>

There was a contention that the *South-Eastern* decision invalidated state regulation,<sup>11</sup> and left the business of insurance uncontrolled.<sup>12</sup> This was the line of argument advanced unsuccessfully by the insurance interests in *Robertson v. California*.<sup>13</sup> The court however upheld the California license requirement for insurance companies and agents as a valid exercise of the police power. This decision forcibly illustrated the veracity of the language of Mr. Justice Black in the *South-Eastern* case "that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine Congressional power under the Commerce Clause."<sup>14</sup>

Thus, insurance may not be "within commerce" in order to validate a state regulation, and yet chameleonicly become subject to federal regulation in a different case. Although some of the language may seem inconsistent, the pliable Commerce Clause<sup>15</sup> is molded to meet contrasting economic needs.<sup>16</sup>

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8. 51 F. Supp. 712 (1943).

9. The decision was four (Black, Douglas, Murphy, Rutledge, J.J.)—three (Stone, C. J., and Jackson and Frankfurter, J.J.). Since Roberts and Reed, J.J., did not sit, the decision was by a minority of the full court.

10. 322 U.S. 533, 541 (1944).

11. Indicative that the states themselves felt that such was the case is the fact that 35 states (including Indiana) filed briefs in the *South-Eastern* case as amici curiae in which they urged affirmance of the decision below sustaining the demurrer to the indictment.

12. "The recklessness of such a course (overruling *Paul v. Virginia*, 8 Wall. 168 (U.S. 1869)), is emphasized when we consider that Congress has not one line of legislation deliberately designed to take over federal responsibility for this important and complicated enterprise." Mr. Justice Jackson (dissenting), *U.S. v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944).

13. 328 U.S. 440 (1946). For an accurate prediction of both the *Robertson* case and the *South-Eastern* case see Gavit "The Commerce Clause" (1932) §162.

14. 322 U.S. 533, 545 (1944).

15. For an analytical discussion of the cases see Gavit, "The Commerce Clause" (1932) *passim*.

16. "The history of the Commerce Clause, from the pioneer efforts of Marshall to our own day, is the history of imposing artificial

In 1945, in order "that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states" the McCarran-Ferguson Act<sup>17</sup> was passed. This statute provided that no Act of Congress should be construed to invalidate any state action unless "such Act specifically relates to the business of insurance."<sup>18</sup> Further, it suspended certain parts of the Sherman Act until January 1, 1948, although acts of boycott, coercion or intimidation remain subject to the anti-trust laws.<sup>19</sup> The McCarran-Ferguson Act was declared constitutional in the *Prudential Insurance Co.* case<sup>20</sup> decided in June, 1946. The test case involved the validity of a South Carolina license tax imposed on foreign-corporation profits earned within the state. The Court, through Mr. Justice Rutledge, observed that the McCarran-Ferguson Act "was a determination by Congress that state taxes, which in its silence might be held invalid as discriminatory, do not place on interstate insurance business a burden. . . ." <sup>21</sup> The Court noted that sixteen states, including Indiana,<sup>22</sup> had foreign life insurance taxes "substantially similar" to the South Carolina tax in issue.<sup>23</sup>

The decision in the *Robertson* case, validating a broad exercise of the police power of the state, plus the *Prudential* decision, indicate the tremendous responsibility placed upon our General Assembly, and the legislatures of other states. Whether insurance shall continue to be regulated by the states depends to a large extent upon how well our legislative bodies discharge this responsibility.<sup>24</sup>

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patterns upon the play of economic life whereby an accommodation is achieved between the interacting concerns of state and nation." Frankfurter, "The Commerce Clause" (1937) 21.

17. 59 Stat. 33 (1945), 15 U.S.C. (Supp. V.) §§1011-1015 (1946).

18. 59 Stat. 33 (1945), 15 U.S.C. (Supp. V) §1012(b) (1946).

19. 59 Stat. 33 (1945) 15 U.S.C. (Supp. V) §1013 (1946).

20. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946).

21. *Id.* at 431.

22. Acts 1935, c. 162, § 235, Ind. Stat. Ann. (Burns, Repl. 1940) §39-4802. See Ops. Att'y Gen. Ind. (1941) p. 361 No. 40.

23. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 431 (1946); *Prudential Insurance Co. v. Indiana*, 328 U.S. 823 (1946).

24. "Despite continued denial by the Dep't of Justice and Congress that the ultimate aim is federal control of insurance, the possibility of such control is very real should state regulation fail. The Senate Judiciary Committee has asked for continuing reports from the industry upon current progress, thus indicating that

*Previous Regulation*—The “Indiana Insurance Law” of 1935 is the basic insurance regulation.<sup>25</sup> This act, as amended, regulates all domestic, foreign and alien corporations authorized to do insurance business in the state.<sup>26</sup> Provision was made for a Department of Insurance,<sup>27</sup> with the powers, duties, management and control of the Department being vested in an “Insurance Commissioner” who is appointed by the Governor.<sup>28</sup> The Department exercises limited rule-making powers and the rules and regulations which it promulgates have the force and effect of law.<sup>29</sup>

Insurance has been divided into three classes: Class 1, Life; Class 2, Casualty and Indemnity; and Class 3, Property.<sup>30</sup> Any company may issue policies covering all or any one of these risks. No insurance company may transact any business in the state without a certificate of authority from the Department, nor write any class of insurance not specified in its certificate.<sup>31</sup> Certificates are issued for a period of one year. The Department may examine the affairs of any insurance company doing business in this state,<sup>32</sup> and the Commissioner has power to revoke or suspend the authorization to do business of any company refusing to permit examinations.<sup>33</sup> He may also revoke or suspend any certificate of authority when any condition prescribed by law for

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Congress is still concerned with the business of insurance.” Note, (1947) 41 Ill. L.Rev. 647.

25. Ind. Stat. Ann. (Burns, Repl. 1940) §§39-3201-5032.

26. Ind. Stat. Ann. (Burns, Repl. 1940) §39-3202.

27. Ind. Acts 1945, c. 351, §1, Ind. Stat. Ann. (Burns, Supp. 1945) §39-3326 which supersedes Ind. Stat. Ann. (Burns, Repl. 1940) §39-3301. These sections place the Department in charge of the organization, supervision, regulation, examination, rehabilitation, liquidation, and/or conservation of all insurance companies to which this act is applicable and the enforcement, administration and execution of this act.

28. Ind. Acts 1945, c. 351, §2, Ind. Stat. Ann. (Burns, Supp. 1945) §39-3327 which supersedes Ind. Stat. Ann. (Burns, Repl. 1940) §39-3302. This section also provides the Commissioner and his assistants shall aid in promoting improvements in insurance laws and the uniformity thereof in the several states.

29. Ind. Stat. Ann. (Burns, Repl. 1940) §39-3311.

30. Ind. Stat. Ann. (Burns, Repl. 1940) §39-3501.

31. Ind. Stat. Ann. (Burns, Repl. 1940) §39-3324.

32. Ind. Stat. Ann. (Burns, Repl. 1940) §39-3312. Every domestic company must be examined at least once every three years. Id. §39-3313. The Department may accept examination of a company by a commissioners' convention or by proper authority of the state in which a foreign or alien company is domiciled. Id. §39-3316.

33. Ind. Stat. Ann. (Burns, Repl. 1940) §39-3314.

the issuance of a certificate ceases to exist. The Department may bring an action against any insurance company which does not comply within thirty days with a department order to discontinue illegal or unsafe practices.<sup>34</sup> The Department may also under judicial order take possession of the business and property of any domestic insurance company for the purpose of rehabilitation.<sup>35</sup>

Foreign or alien insurance companies have the same, but no greater, rights and privileges than a domestic company<sup>36</sup> and must procure a certificate of authority to transact business in this state.<sup>37</sup> A foreign company must also appoint in writing, the Insurance Commissioner and his successors to be its lawful attorney for service of process.<sup>38</sup> However, this provision has been interpreted as authorizing service of process only on a claim arising on an insurance policy written in this state or on a contract entered into with a resident of Indiana.<sup>39</sup>

The basic act, as amended, provided that every fire insurance company must maintain or be a member of a rating bureau<sup>40</sup> whose rates must be filed with the Department.<sup>41</sup>

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34. Ind. Stat. Ann. (Burns, Repl. 1940) §39-3323. Such action shall be brought by the attorney-general in the name of the State of Indiana on relation of the Department of Insurance in the circuit or superior court of the county in which the insurance company has its principal place of business.

35. Ind. Stat. Ann. (Burns, Repl. 1940) §§39-3401 et. seq.

36. Ind. Stat. Ann. (Burns, Repl. 1940) §39-4702.

37. Ind. Stat. Ann. (Burns, Repl. 1940) §39-4701. To obtain a certificate of authority, the foreign company files with the Department a duly certified copy of its charter, a copy of its constitution, a statement of its business under oath by president and secretary, a certificate of the proper official in foreign state that it is legally organized, must furnish the Department such other information as it deems necessary and must show its assets are invested in accordance with the laws of the foreign state. Ind. Stat. Ann. (Burns, Repl. 1940) §39-4704.

38. Ind. Stat. Ann. (Burns, Repl. 1940) §39-4704(h). Power of attorney must contain an agreement by the insurance company that lawful process served on the commissioner shall be of the same force and validity as if served on the insurance company.

39. General Am. Life Ins. Co. v. Carter, 222 Ind. 557, 54 N.E. (2d) 944 (1944).

40. Ind. Stat. Ann. (Burns, Repl. 1940) §39-4310 (a),(b). Fire insurance for purposes of this section includes insurance against loss or damage by fire, lightning, windstorm, sprinkler leakage, use and occupancy and insurance upon automobiles and other vehicles against loss or damage by fire and theft.

41. Ind. Stat. Ann. (Burns, Repl. 1940) §39-4310(c). Rating bureaus are required to file all their rules and regulations.

The Department was required to pass on all changes in schedules<sup>42</sup> and, on written complaint of discrimination in rates, the Department was authorized to order the discrimination removed.<sup>43</sup> Insurers of motor vehicles were also required to file a schedule of rates with the Department.<sup>44</sup> These provisions have been repealed and superseded by a comprehensive scheme of rate regulation discussed *infra*. The Department was authorized to prescribe rates, as such, for only one class of risk—workmen's compensation.<sup>45</sup> These provisions have been continued by Chapter 75 of the Acts of 1947.

The basic insurance law also provided for regulation of insurance agents, and these provisions remain unchanged. An insurance agent must secure a license from the Department.<sup>46</sup> A sworn statement under oath by the applicant that he is qualified to act as an agent, is required, and if the Department deems it necessary to verify the statement, the applicant may be required to show that he is of good business reputation, reasonably familiar with the insurance laws of the state, and with the provisions of the policies he proposes to solicit, and that he has not had a license refused or revoked in any state.<sup>47</sup> A section restricting the solicitation of fire and casualty insurance to agents selling on a commission basis only,<sup>48</sup> has recently been invalidated. The court held that although an insurance agent is engaged in a business "affected with a public interest," whether an insurance agent is paid on salary or on commission has nothing to do with public welfare and has no substantial relation to the police power.<sup>49</sup>

42. Ind. Stat. Ann. (Burns, Repl. 1940) §39-4310(f). Proposed changes are submitted in writing by the bureau to the Department. The Department holds a hearing and makes a finding as to the changes. Any party in interest that is dissatisfied with the finding of the Department may within 30 days commence an action in a court of competent jurisdiction for purpose of reviewing such order.

43. Ind. Stat. Ann. (Burns, Repl. 1940) §39-4310(k). A hearing is held to determine the question of discrimination and a dissatisfied party may have judicial review of the finding.

44. Ind. Stat. Ann. (Burns, Repl. 1940) §39-4310(s).

45. Ind. Acts 1935, c. 323, Ind. Acts 1941, c. 167, Ind. Stat. Ann. (Burns, Repl. 1940) §§39-3005 et seq. See Ops. Att'y Gen. Ind. (1941) p. 427.

46. Ind. Stat. Ann. (Burns, Repl. 1940) §39-4503 (Insurance agents other than life), §39-4603 (Life insurance agents).

47. Ind. Stat. Ann. (Burns, Repl. 1940) §39-4504 (Insurance agents other than life). Life insurance agents must include these provisions in a written application to the Commissioner. Id. §39-4603.

48. Ind. Stat. Ann. (Burns, Repl. 1940) §39-4501(a).

49. Dep't of Ins. v. Schoonover, 72 N.E. (2d) 747 (Ind. 1947).

In short, the previous Indiana legislation has regulated the insurance business by granting and revoking certificates of authority to do business in the state, and by prescribing permissible investments,<sup>50</sup> minimum reserves,<sup>51</sup> and contract provisions.<sup>52</sup> The 1947 legislation in the field broadens the regulation of unfair practices and provides a comprehensive system of rate regulation.

*Unfair Practices*—Chapter 112 broadens the regulation of trade practices in the insurance business in accordance with Congressional intent as expressed in the McCarran Act.<sup>53</sup> The Act is expressly stated to be "in addition" to all other Indiana laws concerning the insurance business,<sup>54</sup> which have prohibited numerous unfair and illegal practices.<sup>55</sup> The Act also preserves all previous criminal penalties as declared by the Indiana Insurance Law<sup>56</sup>—its purpose being to provide additional administrative remedies.<sup>57</sup>

The Act defines six new unfair methods of competition and unfair and deceptive acts and practices:<sup>58</sup>

(1) No person shall make a false entry in or omit a true entry from any book, report or statement of any insurer with intent to deceive any lawfully appointed examiner or any public official to whom the insurer is required to report.<sup>59</sup>

(2) No person shall require as a condition precedent to loaning money upon the security of a mortgage on real

50. See, e.g., Ind. Stat. Ann. (Burns, Supp. 1945) §§39-4202, 4203, 4218 (Life Insurance Co.); Ind. Stat. Ann. (Burns, Repl. 1940) §§39-4303, 4305, 4312 (Casualty, fire & marine).

51. See, e.g., Ind. Stat. Ann. (Burns, Supp. 1945) §39-4208 (Life); Ind. Stat. Ann. (Burns, Repl. 1940) §39-4311 (Casualty, fire & marine).

52. See, e.g., Ind. Stat. Ann. (Burns, Repl. 1940) §§39-4206, 4207, 4210 (Life); Id. §§39-4306, 4308, 4309 (Casualty, fire & marine); Id. §39-3005 (Workmen's Compensation).

53. 15 U.S.C. (Supp. V) §§1011-1013 (1946), discussed supra. See Ind. Stat. Ann. (Burns, Repl. 1940) §39-3203 for a definition of the business of insurance.

54. Ind. Acts 1947, c. 112, §18(a).

55. See Ind. Stat. Ann. (Burns, Repl. 1940) §§39-414, 39-3603, 39-3723, 39-4218, 39-4219, 39-5017, 39-5019, 39-5030.

56. Ind. Acts 1947, c. 112, §4(a). On criminal penalties, see Ind. Stat. Ann. (Burns, Repl. 1940) §§39-414, 39-3723, 39-4219, 39-5017, 39-5024, 39-5030(c).

57. Ind. Acts 1947, c. 112, §18(b).

58. Ind. Acts 1947, c. 112, §4(a). The remainder of §4(a) merely reiterates the unfair practices defined by the Ind. Insurance Law, thus subjecting them to the newly-provided administrative remedies.

59. Id. §4(a) (5).



property that the borrower negotiate any policy of insurance on the property through a particular insurance agent, but the lender may still require his approval of the insurance underwriter chosen by the borrower.<sup>60</sup>

(3) No person shall give, offer to give, or permit any rebate or other special advantage, including excessive or inadequate charges, upon any policy of insurance.<sup>61</sup> But paying bonuses or otherwise abating premiums out of surplus, if fair and equitable, giving rebates for savings effected in making collections, readjusting rates on group insurance upon the basis of expense experience thereunder, and paying commissions to duly licensed agents (if not passed on to the insured by way of rebate) shall not be considered to be "special advantages."<sup>62</sup>

(4) No person shall enter any agreement to commit or by concerted action commit any act of boycott, coercion or intimidation resulting or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.<sup>63</sup>

(5) No person shall enter into "any contract, combination in the form of a trust or otherwise, or conspiracy in restraint of commerce in the business of insurance."<sup>64</sup>

(6) No person shall monopolize or attempt to monopolize or conspire with others to monopolize any part of the commerce in the business of insurance.<sup>65</sup>

The first three provisions enumerated give rise to no particularly unusual or difficult legal problems, and they can be enforced according to their tenor in a more or less routine fashion. The anti-trust provisions of the act, however, raise some interesting possibilities.

A statute adopted from another jurisdiction is presumed to have been adopted with the construction placed upon it

60. Id. §4(a) (9).

61. Id. §4(a) (7) and §4(a) (8) (a).

62. Id. §4(a) (8) (b). Cf. Clayton Act, §2, 15 U.S.C. §13 (1940); Robinson-Patman Act, §1(a), 15 U.S.C. §13 (1940). But cf. Southgate Brokerage Co. v. F.T.C., 150 F.(2d) 607 (C.C.A. 4th, 1945); Great A. & P. Co. v. F.T.C., 106 F.(2d) 667 (C.C.A. 3rd, 1939); U.S. v. N.Y. Great A. & P. Co., 67 F. Supp. 626 (E.D. Ill. 1946).

63. Id. §4(a) (4).

64. Id. §4(a) (10); cf. Sherman Act, 15 U.S.C. §1 (1940); Ind. Stat.

65. Id. §4(a) (11); cf. Sherman Act, 15 U.S.C. §2 (1940); Ind. Stat. Ann. (Burns, 1933) §23-117.

there.<sup>66</sup> Since items five and six were copied almost verbatim from the Sherman Act,<sup>67</sup> federal court decisions should logically be entitled to great weight in interpreting the present Act. Previous Indiana anti-trust laws, however, have not been generally enforced.<sup>68</sup> But it should be noted that prosecutions instituted by the Attorney General under those statutes were heard *de novo* in the courts,<sup>69</sup> whereas fact determinations under the present Act are to be made by the Insurance Commissioner, whose findings must be affirmed by the courts if supported by substantial evidence.<sup>70</sup> This procedural modification, plus the fact that the Insurance Commissioner is in much closer contact with the insurance business than the Attorney General could possibly be with potential defendants under the previous anti-trust acts, should make for much more efficient enforcement of this Act. It should further be noted that this Act provides a penalty only for violation of a cease and desist order promulgated by the Commissioner, and not for simply committing an unfair practice. Consequently the Act may not be subject to the strict construction usually given so-called "penal statutes."<sup>71</sup>

The provisions of the act relating to administrative procedure and judicial review<sup>72</sup> are largely superseded by the Uniform Administrative Procedure Act<sup>73</sup> which was passed

66. *Sexton v. Dreyfus*, 219 U.S. 339 (1911); *Ward v. State*, 188 Ind. 606, 125 N.E. 397 (1919); *Bowman v. Conn.*, 8 Ind. 58 (1856); *In re Russell's Estate*, 294 N.Y. 99, 60 N.E. (2d) 823 (1945).

67. 15 U.S.C. §§1, 2 (1941).

68. *State, ex rel. Lesh v. Ind. Mfrs. of Dairy Products*, 198 Ind. 288, 153 N.E. 499 (1926) appears to have been the last effort to enforce the Ind. anti-trust laws after the fashion of federal enforcement. But cf. *Royer v. State, ex rel. Brown*, 63 Ind. App. 123, 112 N.E. 122 (1916), where Ind. Stat. Ann. (Burns, 1933) §§23-118, 23-119 were strictly enforced by holding that a contractor who had obtained a public works contract by fraud and collusion was not entitled to payment for work performed thereunder.

69. Ind. Stat. Ann. (Burns, 1933) §§23-102, 23-109, 23-113, 23-119, 23-132.

70. Ind. Acts 1947, c. 364, §18; cf. 3 Sutherland, "Statutory Construction" §6605.

71. See 50 Am. Jur., Statutes, §407.

72. Ind. Acts 1947, c. 112, §5 et seq.

73. The Uniform Act, with certain specified exceptions, expressly repeals all prior inconsistent acts, Ind. 1947, d. 365, §28, and acts "passed by this General Assembly, regardless of whether such Act or Acts were passed before or after the effective date of this act." Ibid., §30. The validity of the latter section might be doubtful, as applied to subsequently passed acts, but it clearly supersedes those previously passed.

and approved after the principal act.<sup>74</sup> The Unfair Practices Act is controlling,<sup>75</sup> however, insofar as it provides for ten days notice before hearing,<sup>76</sup> the issuance of a cease and desist order upon a finding that any person has violated any provision of the act,<sup>77</sup> automatic stay of the Commissioner's order for thirty days upon application for judicial review,<sup>78</sup> and for forfeiture of a sum not to exceed two thousand dollars for each violation of a valid cease and desist order of the Commissioner or an order of the court.<sup>79</sup>

*Rates.* The 1947 General Assembly enacted a comprehensive system for the regulation of certain insurance rates in Indiana. Chapter 60 and Chapter 111 purport to promote public welfare by regulating insurance rates and authorizing cooperative action among insurers in rate making.<sup>80</sup> The acts are not intended to prohibit or discourage reasonable competition. Uniformity in insurance rates, rating systems, rating plans or practices is neither prohibited nor encouraged except to the extent necessary for regulating excessive, inadequate or unfairly discriminatory rates. Chapter 60 applies to casualty insurance, including fidelity surety and guaranty bonds, and to all forms of motor vehicle insurance, on risks or operation in this state.<sup>81</sup> Chapter 111 is applicable to

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74. The Uniform Act was passed on March 5, 1947; the Unfair Practices Act was passed on February 20, 1947.

75. Sec. 21 of the Uniform Act provides that that act shall supersede acts giving authority to particular agencies only to the extent that they may be in direct conflict.

76. Ind. Acts 1947, c. 112, §§5(a), 8(a). The Uniform Act provides only for "at least five days notice." Ind. Acts 1947, c. 365, §6.

77. Id. §6(a). The Uniform Act does not specify the type order which may be issued by particular agencies.

78. Id. §7(d). The Uniform Act, §13, provides: "This Act shall not prevent automatic stay of agency action where expressly provided for by law."

79. Id. §12. No penalties are provided in the Uniform Act.

80. The procedure for rate making, filing of rates, licensing of rating bureaus, or any provision which affects the insurer only will not be discussed in detail.

81. The act exempts from its operation the following: (1) Re-insurance; (2) Workmen's Compensation; (3) Accident and health insurance; (4) Abstract and title insurance; (5) Insurance against loss of or damage to aircraft; (6) Insurance against liability arising out of the ownership, maintenance or use of any aircraft; (7) Farmers' mutual insurance companies organized and operating under the farmers' mutual insurance laws of this state. As to the exceptions: a discrimination is valid if not arbitrary and the legislature has wide discretion in fixing classifications. See *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914).

fire, marine and inland marine insurance, and allied lines on risks located in Indiana.<sup>82</sup>

Under the acts, insurance companies are given permission to join any rating organization licensed by the Insurance Department. Membership in such an organization is purely voluntary; but when the insurer becomes a member, it must submit to the organization's rules, subject to an appeal to the Insurance Commissioner. Chapter 269 of the Acts of 1947 specifically provides for certain features of the constitution and by-laws of rating organizations. Rating organizations are specifically prohibited from adopting rules which regulate the payment of dividends, savings or unabsorbed premium deposits to their policy holders, members or subscribers.<sup>83</sup>

The insurer, or, if it belongs to a rating organization, the organization, must make rate filings with the Department. Each filing shall be on file for a waiting period of fifteen days before it becomes effective. The waiting period may be extended an additional period not to exceed fifteen days if the Department gives the rating organization or the insurer written notice stating that the Department needs additional time for consideration of the filing. The Department shall review filings as soon as reasonably possible after they have been made to determine that they are not "excessive, inadequate or unfairly discriminatory."<sup>84</sup> A filing shall be deemed approved unless disapproved by the Department within the waiting period or any extension thereof. The Department has no authority to disapprove any filing which meets the requirements of the act.

It is apparent that the state does not fix rates directly.

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82. Chapter 111 specifically repeals Ind. Acts 1935, c. 162, §178, Ind. Stat. Ann. (Burns, Repl. 1940) §39-4810 which provided for compulsory membership of fire insurance companies in rating bureaus. The following are excluded from the operation of the act: (1) Reinsurance other than joint reinsurances; (2) Insurance of vessels or craft, their cargoes, marine builders' risks, marine protection and indemnity, or other risks commonly insured under marine, as distinguished from inland marine, insurance policies; (3) Insurance of hulls of aircraft, including accessories and equipment, or against liability arising out of ownership, maintenance or use of aircraft; (4) Motor vehicle insurance or insurance against liability arising out of ownership, maintenance or use of motor vehicles; (5) Farmers' mutual insurance companies organized and operating under the farmers' mutual insurance laws of Indiana.

83. Ind. Acts 1947, c. 60, §7, c. 111, §7(c).

84. Ind. Acts 1947, c. 60, §4(a), c. 111, §4(a)2.

The power to fix rates initially is delegated to the insurer or the rating organization, but the rates do not become effective until approval by the Department. Do these sections come within the constitutional prohibition against the delegation of governmental powers?<sup>85</sup>

The authority of the legislature to delegate power to private persons is a very controversial field.<sup>86</sup> In 1901 the Indiana Supreme Court held that a statute conferring upon the State Dental Association power to appoint three members of the State Board of Dental Examiners did not transcend the constitutional power of the General Assembly even though the Dental Association was a private corporation.<sup>87</sup> A federal court, in construing a Kentucky statute which created a rating bureau and required each insurer to be a member thereof, held that the rating bureau was the agent of the insurance companies which constituted its membership; and said, “. . . we know of no reason why a statutory provision requiring that an agreement entered into by insurance companies, calling for an increase in their rates from what they have theretofore been, which is to be put into effect by a special agency created by them for that purpose shall, before they are so put in effect, be filed with a state official, is not valid.”<sup>88</sup> The United States Supreme Court upheld a statute which authorized the American Railway Association to specify to the Interstate Commerce Commission the standard height of draw bars for freight cars.<sup>89</sup> In another case the same court said, “. . . a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be ‘to stop the wheels of government’ and bring about confusion, if not paralysis, in the conduct of the public business.”<sup>90</sup> Since the 1947 Acts under consideration prescribe a standard, provide for approval by the Insurance Department before a rate becomes effective and afford adequate review by the courts, it is submitted

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85. Ind. Const. Art. IV, §1.

86. For a good discussion pointing out the problems see Jaffe, “Law Making by Private Groups,” (1937) 51 Harv. L. Rev. 201.

87. *Overshiner v. State*, 156 Ind. 187, 59 N.E. 463 (1901). But see *Tucker v. State*, 218 Ind. 614, 699, 35 N.E. (2d) 270, 302 (1941).

88. *Aetna Fire Insurance Co. v. Shanks*, 14 F. (2d) 690, 694 (1926).

89. *St. Louis, I. M. & S. Ry. v. Taylor*, 210 U. S. 281 (1908).

90. *Union Bridge Co. v. U.S.*, 204 U.S. 364, 387 (1907).

that they do not come within the constitutional prohibition.<sup>91</sup>

After a filing of rates by an insurer or rating organization has become effective, the filing and any supporting information shall be open to public inspection. Any person or organization aggrieved by any filing which is in effect may make written application to the Insurance Department for a hearing.<sup>92</sup> The application shall specify the grounds upon which the applicant relies. If the Commissioner finds that the application is made in good faith, that the applicant would be aggrieved if his grounds are established, and that the grounds otherwise justify it, he shall hold a hearing. It shall be held within thirty days after receipt of the application and upon not less than ten days written notice to the applicant and to every insurer and rating organization which made the filing. If the Commissioner finds that the filing does not meet the rate standard, he shall issue an order specifying in what respects he finds the filing deficient. He shall further state when the filing shall be no longer effective. Copies of the order shall be sent to the applicant and to the insurer and rating organization concerned. The order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in the order.

Every rating organization and every insurer which makes its own rates shall furnish to any insured affected all pertinent information as to the rates established. The insurer or organization must act within a reasonable time after receiving a written request for the information, and it may make a reasonable charge for the service.<sup>93</sup> Every rating organ-

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91. For examples of rating bureau statutes see Ind. Stat. Ann. (Burns Repl. 1940) §39-3008 (Workmen's Compensation); Ind. Stat. Ann. (Burns, Repl. 1940) §39-4310 (Fire, marine and inland marine), repealed by Ind. Acts 1947, c. 111.

92. Chapter 60 does not contain an express provision whereby an aggrieved person may make application to the Commissioner for a hearing on any filing in effect. The other provisions for review of the filings by the Commissioner for the insured are the same. Therefore, a later section providing that any insured or person aggrieved by any order or decision of the Commissioner made without a hearing may make written request to the Commissioner for a hearing should give the insured his right to a hearing. A proviso makes the procedure described here inapplicable to the insurer or rating organization that made the filing. Quaere: If the insurer or rating organization that made the filing is the only exemption, would it be possible for another insurance company or rating organization to proceed under this section?

93. Permission to charge for the information is not given to the insurer or rating organization in Chapter 60.

ization and every insurer which makes its own rates shall provide, within Indiana, reasonable means for hearing any person aggrieved by the application of its rating system. If the organization or insurer fails to grant or rejects within thirty days, the insured's written request to review the manner in which the rating system has been applied in connection with the insurance afforded him, the applicant may proceed as if his application had been rejected. Any person affected by the action of the organization or insurer on the request may, within thirty days after written notice of the action, appeal to the Department of Insurance. The Commissioner shall hold a hearing upon not less than ten days notice to the applicant and to the organization or insurer. He may affirm or reverse the action taken on the insured's request. This, in effect, gives the insured an alternative procedure for review of his complaints, i.e. he may go through the rating organization or insurer to the Commissioner instead of filing an application directly with the Insurance Department.

Any insured, insurer, rating organization or other party in interest aggrieved by any order or decision of the Commissioner made *without a hearing*, may, within thirty days after notice of the order, make written request to the Commissioner for a hearing. Within twenty days after receipt of the request, the Commissioner shall hear the parties. He shall give not less than ten days written notice of the time and place of the hearing. The Commissioner is to affirm, reverse or modify his previous action within fifteen days after the hearing.

Any order or decision of the Commissioner is subject to judicial review in accordance with the 1947 Administrative Procedure Act.<sup>94</sup>

The wilful violation of any provision of the act by any person, rating organization or insurer is deemed a misdemeanor. The violator, upon conviction, shall be fined not less than one hundred dollars and not more than five hundred dollars for each violation. The punishment applies to any person or organization that wilfully withholds information from, or knowingly gives false or misleading information to, the Commissioner, the Department, any statistical agency designated by the Department, any rating organization, or any insurer

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94. Ind. Acts 1947, c. 365. Discussed herein p. 319.

which will affect the rates or premium chargeable under the act.<sup>95</sup>

When the Commissioner issues an order disapproving an effective rate filing, the order is to state in what respects the filing is deficient and when, within a reasonable time, the filing shall be deemed no longer effective. The act provides that the Commissioner's order "shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order." That provision certainly permits the insurer to contract on the deficient rate base for a limited time. But, can the new rate filing, after it has been approved by the Commissioner, be interpreted to govern contracts made prior to the Commissioner's approval?

The state constitution<sup>96</sup> as well as the federal constitution<sup>97</sup> prohibits impairment of the obligation of contracts. It has been stated that a public utility has no vested right in the continuance of any rate fixed, and that the state may fix different rates without disturbing vested rights.<sup>98</sup> It is said that "all contracts made for services to be furnished by public utilities must be regarded as made in contemplation of the regulatory powers of the state and that, when the state exercises such power by changing rates or conditions of service, such change does not impair the obligations of existing contracts, although such contracts must yield to the changes so made."<sup>99</sup> That seems to be the generally accepted view.<sup>100</sup>

The United States Supreme Court has advanced a similar theory and applied it to Building and Loan Association regulations. It was stated by Mr. Justice Reed that when one purchases "into an enterprise already regulated *in the par-*

95. No provision of Ind. Stat. Ann. (Burns, Supp. 1945) §§60-1501 to 1511 (Administrative Rule-Making Act) shall be construed to apply to rates or classifications made pursuant to this act and approved by the Commissioner or Department.

96. Ind. Const. Art. I, §24.

97. U.S. Const. Art. I, §10.

98. Central Union Telephone Co. v. Indianapolis Telephone Co., 189 Ind. 210, 219, 126 N.E. 628, 632 (1919).

99. Id. at 227, 126 N.E. at 634.

100. See Mississippi River Fuel Corp. v. Federal Power Commission, 121 F. (2d) 159, 163 (1941) where the court said, "Having held the statute a constitutional regulation of 'an industry. . .subject to control for the public good'. . .it logically follows that contracts made by petitioner, even though prior to its enactment, are also subject to regulation in public interest."



ticular to which he now objects, he purchases subject to further legislation upon the same topic.”<sup>101</sup> (Italics added.) That case is especially pertinent when applied to contracts of insurance made after the Acts of 1947 have taken effect.

It has long been recognized that insurance is subject to state regulation.<sup>102</sup> The Supreme Court of Indiana has said that the business of insurance is “quasi-public in character, and the right to engage in it is a franchise.”<sup>103</sup> The question becomes, will the court treat insurance as they have public utilities? An insurance contract is controlled by the same law as any other contract.<sup>104</sup> The premium to be paid is the heart of the contract,<sup>105</sup> and Indiana courts protect the obligation of a valid contract.<sup>106</sup>

It is submitted that authority exists to uphold as constitutional an interpretation which would make new rates, as approved, applicable to prior contracts. That result has been reached in the regulation of workmen’s compensation insurance rates.<sup>107</sup> As to contracts made *after regulation of insurance rates became effective*, there would seem to be no valid constitutional objection. But the Indiana court adheres to the dogma that if a statute can be construed and applied so as to avoid a conflict with the constitution, such a construction will be adopted by the court.<sup>108</sup> Therefore, it is submitted, that since the 1947 legislation does not specifically make the rates as fixed by the Insurance Commissioner applicable to past contracts of insurance, the acts will be construed

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101. *Veix v. 6th Ward Bldg. & Loan*, 310 U.S. 32, 38 (1940).

102. It has already been reaffirmed in Indiana that insurance is a business “affected with the public interest.” *Department of Insurance v. Schoonover*, 72 N.E. (2d) 747, 749 (Ind. 1947).

103. *National Colored Aid Society v. State ex rel. Wilson*, 208 Ind. 380, 393, 196 N.E. 240, 246 (1935).

104. *Metropolitan Life Insurance Co. v. Atterovitz*, 214 Ind. 186, 203, 14 N.E. 2d 570, 577 (1938).

105. “The premium is of the very essence of the contract, or, in other words, the premium paid by the insured and the peril assumed by the insurer are two correlatives, inseparable from each other, it being their union which constitutes the essence of the contract.” “*Couch On Insurance*” §581 (1929).

106. *Heath v. Fennig*, 219 Ind. 629, 632, 40 N.E. (2d) 329, 331 (1941).

107. The leading case is *Employer’s Liability Assurance Corp. v. Success—Uncle Sam Cone Co.*, 208 N.Y.S. 510. The court said at page 512, “. . . the policy of the state (as expressed in the Insurance Law) is to remove the matter of rates, premiums, and classifications from the field of private bargaining and agreement.”

108. *Heath v. Fennig*, 219 Ind. 629, 633, 40 N.E. (2d) 329, 331 (1941).

as not applicable to contracts of insurance in existence prior to the effective date of the new rates.

*Other New Legislation*—Chapter 75 makes the rate standard of “excessive, inadequate or unfairly discriminatory” applicable to workmen’s compensation insurance rates and broadens the Insurance Commissioner’s authority in regulation thereof.

Chapter 269, as mentioned *supra*, adds a new section to the Indiana Insurance Law regulating insurance rating bureaus.

Chapter 43 amends the permissible investment statute as to domestic life insurance companies.